KIDURONG LAND SDN. BHD. & ANOR *a*

v.

LIM GAIK HUA & ORS.

SUPREME COURT, KOTA KINABALU
LEE HUN HOE CJ (BORNEO)
HARUN HASHIM SCJ
MOHD. YUSOFF MOHAMED SCJ
[CIVIL APPEAL NO. 358 OF 1988]
8 JANUARY 1990 *b*

CONTRACT: *Joint-venture agreement - Guarantees - Agreement to develop two parcels of land - Completion date - Delay - Extensions granted by respondents - Lands charged to secure facilities - Appellants unable to complete project - Termination of contract by respondents - Contention by appellants that agreement void and unenforceable - Against public policy - Contravention of s. 24(e) of the Contracts Act - Section 67 Companies Act 1965 - Whether in contravention of - Consideration or object of agreement - Whether lawful - Variations to agreement - Whether material variation - There must be consent - Whether it discharges appellant from his obligations.* *c* *d*

In this case, the respondent landowners agreed to allow the appellants, who were developers, to develop two parcels of land in exchange for a number of units of houses and to allow the appellants to charge the land to a bank to provide bridging finance. The respondents and appellants entered into a joint-venture agreement, whereby the appellants were to complete the development within 30 months from the date of execution. The respondents however negotiated with the appellant for an extension, which extension was granted by the appellants. *e*

The respondent however still failed to carry out the development and finally the respondents by notices under cls. 15 and 17 of the respective agreements terminated the contracts by letter dated 17 September 1984.

The appellants now contend that the agreements are void and unenforceable as being against public policy and consequently the guarantees provided are also void and unenforceable not only against public policy, but also void and unenforceable under s. 24(e) of the Contracts Act 1950. *f*

Further, the appellants contend that the agreement was in contravention of s. 67 of the Companies Act 1965.

Held: *g*

[1] The Taman Hilltop and Taman Fairway agreements are valid and the Judge was not wrong in his approach as regards the contentions on public policy.

[2] The funding of the consideration by Chen i.e., the funding of the project which in effort is the funding of the houses to be transferred is any direct or indirect financial assistance and as such is a breach of s. 67 of the Companies Act 1965. The 3rd appellant succeeds on this ground. *h*

[3] There were variations to the Taman Fairway and Taman Hilltop agreements and the variations were material. The variations to the two detached houses would incur extra construction cost of RM87,000 for each house totalling RM174,000. There was no consultation with reference to the variation and execution of the supplementary agreement and no board meeting of Kidurong was called to approve the same. *i*

[4] The effect of the variations were such as to discharge the 3rd appellant Ling from his obligations in respect of the two guarantees. The 3rd appellant succeeds on this ground.

[Order accordingly.]

Cases referred to:
Miller v. Karlinski [1945] 62 TLR 85
Napier v. National Business Agency [1952] 2 All ER 264
Alexander v. Rayson [1936] 1 KB 169
Skelton v. South Auckland Blue Metals Ltd. (in Liquidation) [1969] NZLR 955
Selangor United Rubber Estates v. Cradock [1968] 1 WLR 1555
Heald v. O'Connor [1971] 1 WLR 497
Carney v. Herbert [1985] LRC (Comm) 835
Charterhouse Investment Trust Ltd. v. Tempest Diesel [1986] BCLC 1
Mookapillai & Anor. v. Sri Saringgit Sdn. Bhd. & Ors. [1981] 2 MLJ 114
Trevor v. Whitworth [1887] 12 App Cas 409
Armour Hick Northern Ltd. & Ors. v. Whitehouse & Ors. [1980] 3 All ER 833; 1 WLR 1520
Citibank N.A. v. Ooi Boon Leong [1981] 1 MLJ 282
Holme v. Brunsill [1978] 3 QBD 498
The General Steam Navigation Co. v. Rolt [1958] 6 CB (NS) 550
Wren v. Emmett Contractors Pty. Ltd. [1969] 43 ALJR 213
Woodstock v. Oxford & Worcester Railway Company [1953] 61 ER 551
Winstone v. Bourne [1978] 1 NZLR 94
Coronation Electronics Ltd. v. Lalchand Mahtani [1987] 1 MLJ 190

Legislation referred to:
Companies Act 1948 [UK], s. 54
Contracts Act 1950, ss. 24(a), (b), 86
Companies Act 1961 [Aust], s. 67
Companies Act 1965, ss. 64, 67, (3), (6)

Other sources referred to:
Law on Guarantee by McGuiness, p. 12
Rowlatt on Principles of Surety, p. 90
O'Donovan Phillips on Modern Contracts on Guarantee, pp. 269, 270

For the appellants - Colin Lau (Shirley Wong with him); M/s. Szetu & Co.
For the respondents - Mahinder Singh Dulku (Francis Chia with him); M/s. Shelley Yap Leong Tseu Chong Chia & Co.

JUDGMENT

Lee Hun Hoe CJ (Borneo):

By consent these two appeals were heard together as they involve the same appellants and members of the Ong family in respect of two housing projects known as the Taman Fairway project and the Taman Hilltop project. A third appeal which was to be heard together was struck off as the notice of appeal was not served within time and leave for extension of time to serve was refused. These appeals arose out of two civil suits nos. K. 856 of 1985 and K. 862 of 1985 in the High Court in Borneo held in Kota Kinabalu. They were consolidated and heard together on certain agreed statement of facts. The 2nd appellant (Ting Ing Chiew), the 3rd appellant (Alex Ling Lee Soon) and the 4th appellant (Dato Haji Salleh Jafaruddin) gave evidence in the Court below. The 2nd appellant and the 4th appellant were joint managing directors of 1st appellant (hereinafter referred to as Kidurong). The respondents did not call any witness.

There are three grounds of appeal. First, that the learned Judge erred in not holding that the Taman Fairway and the Taman Hilltop agreements were affected or tainted with illegality by reason of public policy. Secondly, that the learned Judge erred in not holding that the purchase of shares in Chen Hua Development (M) Sdn. Bhd. contravened s. 67 of the Companies Act 1965. Thirdly, that the learned Judge erred in law in not applying the correct test as to the materiality of the variations.

The Facts

It is necessary to set out the facts in some detail. In 1979 the family of the late Ong Chin Kow owned three parcels of land in Kota Kinabalu, Sabah and were interested in developing the properties. The 2nd appellant (hereinafter referred to as Ting) wrote to the broker Su Lik Hua (see Part C Vol. I, p. 1) proposing certain terms and conditions and seeking confirmation. One of the terms is that the owner is to get in return for every acre of land two units of semi-detached houses. Consequently, in 1980 Kidurong was formed and registered to carry out the joint venture. It was to be the developer, to raise finance, appoint consultant and complete the housing project. The owners would provide the land. The 1st respondent (hereinafter referred to as Madam Lim) the wife of the late Ong Chin Kow was the registered owner of a parcel of land described as Lease No. 015316533 (hereinafter referred to as Taman Fairway). Madam Lim, her husband and other members of the family together held the entire shareholding of Chen Hua Development (M) Sdn. Bhd. (hereinafter referred to as Chen) which was the registered owner of land described as Country Lease No. 015019495 and had 1280/1556 of the 'undivided right title share' in land described as Country Lease No. 015019038 (hereinafter collectively referred to as Taman Hilltop).

On 17 March 1980 a joint and several letter of guarantee (Fairway guarantee) was signed by Ting, 3rd (hereinafter referred to as Ling) and 4th appellant as guarantors in favour of Madam Lim in respect of the obligations of Kidurong under a putative agreement except for Clause 6(a) and sale and purchase and development of that parcel of land belonging to Taman Fairway with an area of 9.47 acres. All the other terms of the putative agreement at that date were uncertain, unspecific and the aforesaid agreement was not completed and executed then, and purporting to be given in consideration for Madam Lim in entering into the agreement.

On 17 March 1980 Madam Lim and Kidurong entered into an agreement (Fairway agreement) whereby Madam Lim was to transfer her interest in Taman Fairway to Kidurong which was to develop it. The stated consideration was 2.1 million to be paid in kind by the transfer back of 19 units of semi-detached houses and one unit of detached house to be constructed on the property to Madam Lim on completion of the project which was to be 30 calendar months from the date of the execution of the Fairway agreement. Madam Lim duly transferred her interest in Taman Fairway to Kidurong.

On 17 May 1980 Kidurong and the shareholders of Chen entered into an agreement (Hilltop agreement) whereby the shareholders of Chen transferred their shares to Kidurong which contracted to develop the two parcels of land belonging to Chen for a stated consideration of RM3.8 million to be paid in kind by the transfer to the vendor of 36 units of semi detached houses and one unit of detached house to be constructed on the Hilltop properties. The completion date was within 30 calendar months from the date of the execution of the Hilltop agreement.

Again, on 17 May 1980 a letter of guarantee (Hilltop guarantee) in very similar terms to the Fairway guarantee, was given to the vendors of the shares of Chen by the same three guarantors in consideration of their entering into the Hilltop agreement for development of

the Taman Hilltop land by Kidurong and for due performance of their obligations under that agreement.

Shortly after, on 17 May 1980 the shareholders of Chen and Kidurong entered into a supplementary agreement (stakeholder agreement) whereby the shares of Chen, the subject-matter of the Hilltop agreement, were to be deposited with Messrs. Chin Lau and Wong with the term that the shares were to be returned to the vendors in the event that Kidurong did not fully comply with the terms of the agreement. What transpired thereafter was that the shares in Chen were eventually transferred by the respondents to Kidurong.

Following discussion between the late Ong Chin Kow and Ting during the period July 1981 and August 1982, material variations were agreed to the specifications of one detached house to be transferred to Madam Lim under the Fairway agreement. Similar alterations were also made and agreed to in respect of the detached house in the Hilltop agreement. These variations considerably and materially increased the cost of building these detached houses by approximately RM87,000 each. On 8 December 1982 Madam Lim agreed to accept the exchange of four (4) units of semi-detached houses for four (4) units of flatted apartments to be sold back to Kidurong at RM250,000 each within 12 months from the date of completion of the flatted apartments in Taman Fairway. She requested that the term be incorporated in the supplementary agreement. However, when the supplementary agreement was eventually executed on 28 February 1983 this particular term was left out at her request. She was given the right to choose the four (4) units on any floor on any block of the flatted apartments. Then on 21 August 1982 the late Ong Chin Kow requested and it was agreed that the arches in the car porch area be incorporated to the two detached houses after the building plans were approved by the relevant authorities on 27 July 1982 in respect of the Taman Fairway and Taman Hilltop projects.

At about that time it became apparent that the two projects could not be completed within 30 months of the date of execution of the Fairway and Hilltop agreements. Ting on behalf of Kidurong negotiated with the respondents for extension of the completion dates. As a result, two more documents were executed: (i) By a supplementary agreement dated 28 February 1983, the completion date of Taman Fairway project was extended to 26 January 1984; (ii) By a letter dated 23 February 1983 and countersigned by the vendors of the Hilltop agreement, Ong Kah Thye and Ong Kah Lam on 28 February 1983 agreed to extend the completion date of the Taman Hilltop project to 26 July 1984, and the rest of the vendors (including the administrators of the now deceased Ong Chin Kow) agreed to extend it to 26 January 1984.

Kidurong was unable to complete the two projects by the extended dates. In 1983 Kidurong obtained advances from Borneo Housing Mortgage Finance Bhd. for the purpose of developing these two projects which was secured, *inter alia*, by charging the lands belonging to Chen. The parties exchanged letters throughout 1984 as to the respondents' entitlement to claim liquidated damages under the Fairway and Hilltop agreements. Finally, the respondents gave notices under cls. 15 and 17 of the respective agreement to terminate the contracts by letter dated 17 September 1984.

Public Policy

The contention of the appellants is that the Taman Fairway and the Taman Hilltop agreements are void and unenforceable as being against public policy. This is because the respondents intended to mislead and deceive the Malaysian revenue authorities and thereby evade income tax, real property gains tax and stamp duty by deliberately prefixing and the undervaluing the houses to be transferred on completion. Consequently, the guarantees are also void and

unenforceable not only against public policy but also under s. 24(e) of the Contracts Act 1950 which provides the consideration or object of an agreement is lawful unless ... (e) the Court regards it as immoral, or opposed to public policy.

The contention of the appellants is that stated consideration of RM2.1 million in respect of Taman Fairway agreement and RM3.8 million in respect of Taman Hilltop agreement were very much less than the actual consideration being the transfer of 19 units of semi-detached houses and one unit of detached house and 36 units of semi-detached houses and one unit of detached house respectively which units has a much higher value than the prefixed value. There was also the agreement between Madam Lim and Kidurong whereby Kidurong would buy back fours units of flatted apartments within one year after completion at RM250,000 per unit when the unit was expressly stated to be RM100,000. It is trite law that if an agreement is made with the intention of deceiving or misleading the relevant revenue authorities then it is contrary to public policy and cannot be sued upon. (See *Miller v. Karlinski* [1945] 62 TLR 85; *Napier v. National Business Agency* [1952] 2 All ER 264, 265 and *Alexander v. Rayson* [1936] 1 KB 169.

Appellants pointed out that the Taman Fairway and the Taman Hilltop agreements were intended to mislead the revenue authorities. For the purpose of assessing the relevant taxes the two agreements would be presented to the revenue authorities to substantiate the consideration against which tax would be assessed. For this reason, specific figures were inserted into the two agreements. This is also the reason why Madam Lim eventually decided against inserting the figure of RM250,000 per flat in the supplementary agreement which Kidurong had to buy back the four flats valued at RM100,000 per flat in the Taman Fairway agreement. The submission of the appellants is that in consequence the revenue authorities would be deceived or misled as to the tax liability of the respondents under the Taman Fairway and Taman Hilltop agreements. This, they say, is contrary to public policy. Accordingly, the two agreements are void and unenforceable. It therefore follows that the guarantees are also void.

On the other hand, the respondents submitted that the appellants had misconstructed the facts to suit their advantage. They pointed out that the cases cited by the appellants related to agreements when the consideration was illegal whereas the consideration in these actions as expressed in the Taman Fairway and Taman Hilltop agreements were valid. So, in respect of the Taman Fairway and Taman Hilltop agreements all that respondents could claim at the end of the day in the event of breach of the agreement would be RM2.1 million and RM3.8 million respectively. It is true that respondents originally claimed for loss of profit but this claim was abandoned on the first day of the hearing of the action. The forfeiture of deposit in the event of breach by a developer is not something unusual in a contract of this nature.

We know that Kidurong agreed to give in return for every acre of land two units of houses. The Taman Fairway and Taman Hilltop agreements were entered into on that basis. Other details were then negotiated and agreed. Kidurong clearly made a mistake when it overlooked the fact that over an acre of the land in Taman Fairway was acquired by the Government. This was confirmed by Ting when he gave evidence.

It is quite common practice in this country for a landowner to allow a developer to develop his land in exchange for a number of units of houses and to allow such developer to charge the land to a bank to provide such developer with bridging finance. There is nothing illegal about this sort of arrangement but the risk is on the landowner in the event of a recession as many landowners must have experienced. Liability to income tax has not arisen at the time of signing of an agreement.

As the learned Judge said (see Pt. A Vol. I, p. 22):

> It is clear to the Court that the Taman Hilltop and Taman Fairway joint venture agreements clearly expressed the intention of the parties to develop the Hilltop and Fairway land in terms stated in the agreements upon the consideration so stated. The allegation that it is void as being affected by illegality as alleged is an afterthought and a 'red-herring' brought forward only for the purpose of trying to absolve the defendants of their obligations under the joint venture agreements. As far as the contention of prepegging of the price of the semi-detached houses and detached houses for the purpose of evading revenue law, it is a fact that the revenue authorities had never been bound in fixing duties and taxes by the prices of these houses stated in these agreements. In assessing the value of the houses they follow their own assessment and go by the market value irrespective of whatever price is stated in the agreements. Having considered Counsel's submission including the cases, I find that the Taman Hilltop and Taman Fairway agreements are valid ...

In so far as public policy is concerned, we have not been persuaded that the learned Judge was wrong in his approach. Accordingly, we hold that this ground of appeal fails.

Section 67 of the Companies Act 1965

Section 67 of the Companies Act 1965 provides that:

> Except as is otherwise expressly provided by this Act no company shall give whether directly or indirectly and whether by means of a loan guarantee or the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or, where the company is a subsidiary, in its holding company or in any way purchase deal in or lend money on its own shares.

The next contention of the appellants is that the Taman Hilltop agreement is void because of the contravention of the said s. 67 in that Chen had in fact given financial assistance to Kidurong to acquire Chen's shares. This therefore also renders the guarantees void and unenforceable not only under the said s. 67 but also under s. 24(a) and (b) of the Contracts Act 1950 which provides that the consideration or object of the agreement is lawful unless (a) it is forbidden by law; and (b) it is of such a nature that if permitted it would defeat the law.

Clause 5 of the Taman Hilltop agreement reads as follow:

> It is hereby expressly agreed that the said consideration and purchase price of RM3,800,000 for the sale of the whole of 1200 ordinary shares of RM1000 each in Chen payable in kind by the purchaser to the vendors under this agreement shall be that the purchaser shall transfer to the vendors jointly thirty-six (36) units of semi-detached lots and one (1) unit of detached lot (land) together with thirty-six (36) units of 2 storey reinforced concrete semi detached houses (RM100,000 x 36 - RM3,600,000) and one (1) unit of 2 storey detached house RM200,000) to be constructed and completed by the purchaser on the said lands respectively (hereinafter collectively referred to as 'the vendors' houses).

According to the appellants under Clause 5 of the Taman Hilltop agreement the consideration of the sale of the shares in Chen to Kidurong is "the transfer to the vendors jointly" of buildings to be built on the Taman Hilltop land. In order to finance the construction of the houses Chen provided Kidurong with its assets, namely, the Taman Hilltop land to enable Kidurong to finance the development of the Taman Hilltop land. At all material times the Taman Hilltop land remained in the ownership of Chen and Chen executed the charge over the Taman Hilltop land in favour of Borneo Housing Mortgage Finance Bhd. The money

raised by the charge made it possible for Kidurong to finance the purchase. Financial assistance includes any financial assistance.

If any financial assistance is given, then the Court will not assist in enforcing the contract which will be void. (See *Skelton v. South Auckland Blue Metals Ltd. (in Liquidation)* [1969] NZLR, 955; *Selangor United Rubber Estates v. Craddock* [1968] 1 WLR, 1555, 1653-9; and *Heald v. O'Connor* [1971] 1 WLR, 497. Therefore, it was contended that the purchase of the Chen shares by Kidurong was financed by Chen by way of charging the Taman Hilltop land being Chen's only asset.

The learned Judge commented as follows: (see Part A Vol. I, para. 34, p. 21):

> In considering the Hilltop joint venture agreement we have to take the joint venture agreement as a whole and not just take the transfer of the 36 units of semi-detached houses and one unit of detached house in isolation belonging to 'Chan' and say that this was done to assist the vendors to purchase the shares to Chen. The Court is obliged to put the agreements in their proper perspective. It is clear that in exchange for the transfer of 'Chen' to the 1st defendant in order that the 1st defendant may develop the Hilltop land belonging 'Chen' at a profit they agreed that the vendors, the shareholders of Chen, would receive the transfer of the said developed 36 units of semi-detached houses and one unit of detached house in the Hilltop land. Clearly what the vendors had in share value was exchanged in the form of 36 units of semi-detached houses and one unit of detached house. How the 1st defendant will settle with 'Chen' to bring into effect the original intention of the parties is absolutely an internal matter between the 1st defendant and 'Chen'. I find no merit in the defendants' argument that the transfer of the 36 units of semi-detached houses and one unit of detached house was assistance in the purchase of Chen's shares ...

The learned Judge's finding on this point was attacked. It was said that he misconstrued the express intent of the parties when they entered into the Taman Hilltop agreement. It was further said that the financing of the purchase of Chen's shares was not an internal matter between Kidurong and Chen. The financing of the purchase price (being the transfer of 36 semi-detached houses and one detached house) was the utilization of the Taman Hilltop land (being the only asset of Chen) by Kidurong developing the same by building 36 semi-detached houses and one detached house. The effect of this arrangement was that Chen's only asset, i.e., the Taman Hilltop land, was used to finance the development of the 36 semi-detached houses and one detached house and thereby to finance the purchase of the Chen's shares by Kidurong. Corrobation that the arrangement and the effect of the arrangement was that the Taman Hilltop land was to finance the purchase of Chen's shares is the fact that Chen executed a charge over the Taman Hilltop land in favour of Borneo Housing Mortgage Finance Bhd. for the benefit not of Chen but of Kidurong. This, it is submitted, is a breach of s. 67 and falls within the principles established by *Skelton's* case and *Heald's* case. Accordingly, the Taman Hilltop agreement is void. The consideration for the Taman Hilltop guarantee being the Taman Hilltop agreement is void and therefore the guarantee is void.

The learned Judge was quite correct to refer to the Taman Hilltop project as a joint venture agreement although called sale and purchase agreement, bearing in mind Ong Kah Sheng (3rd respondent in Supreme Court Civil Appeal No. 359 of 1988) was the financial controller of Kidurong. The money obtained from the charge by Chen was mainly for the development of the land including the construction of the houses. The payment of the shares was by the transfer of certain units of houses. The payment although expressed in cash was to be made in kind by the transfer of certain number of houses. It is contended that the funding of the project which in effect is the funding of the houses to be transferred on completion is any direct or indirect financial assistance and as such a breach of s. 67.

Mr. Mahinder Singh Dulku for the respondents cited *Carney v. Herbert* [1985] LRC (Comm) 835 and *Charterhouse Investment Trust Ltd. v. Tempest Diessel* [1986] BCLC 1 to support his contention that there was no contravention of s. 67. In *Carney's* case C agreed with the respondent to purchase, through a company nominated by him, all their shares in a company, Airfoil, of which C and the respondents were the directors. The purchase price was to be paid in three instalments; the first on the execution of the agreement, and the other two by post-dated cheques. All the cheques were signed by C and were drawn on Airfoil's bank account. It was further agreed, at the insistence of the respondents, that a factory belonging to a subsidiary of Airfoil should be mortgaged to the respondents as security for the second and third instalments of the purchase price. Formal agreements were executed by each of the respondents with the transferee company; the mortgages were also executed and C gave a personal guarantee against any default in the payment of the purchase price by the transferee company. In the event, when the cheques for the second instalments of the purchase price were presented had been closed. Neither C nor the transferee company made good the second and third instalments and the respondents sued C on his guarantee in the Supreme Court of New South Wales. Rogers J dismissed C's plea that the contract was illegal for breach of the Companies Act 1961, s. 67, in that (principally) the security had been provided by a subsidiary of Airfoil, and found for the respondents. C appealed to the Privy Council. In dismissing the appeal the Privy Council held that :

> (1) The mortgage were illegal and void as a criminal breach of the Companies Act 1961, s. 67.
>
> (2) The contract was basically one for the sale of shares in Airfoil to a company nominated by C; even though at the time of the transaction the respondents had insisted upon the execution of the mortgages both the mortgages and the guarantee were ancillary to the basic purpose of the transaction and the elimination of the mortgages would leave the subject-matter of the contract and the primary obligations of the parties unchanged; the mortgages were, therefore severable from the remainder of the transaction and their illegality did not taint the contract as a whole, accordingly, as there were no objections to the enforcement of the contract from which the mortgages had been divorced on grounds of public policy, the guarantee was enforceable against C ... .

In *Charterhouse's* case Tempest was a subsidiary of Charterhouse Corporate Investment Ltd. (CCI) both companies being part of the Charterhouse Group. Tempest was trading at a loss and had substantial losses for the years 1979 and 1980. In 1981 it was resolved to windup the company unless a purchaser could be found. A, a director of Tempest, considered that its fortunes could be reversed and he entered into negotiations with two other directors of Tempest who represented CCI, for the purchase of the entire share capital of the company. It was eventually agreed that A should purchase the share capital of Tempest. The terms of the agreement (principal agreement) were that (a) CCI would subscribe for 780,000 1 pounds shares to be issued by Tempest and this money would be used to pay off Tempest's overdraft and all but 150,000 pounds of this indebtedness to CCI; (b) A would loan Tempest 50,000 pounds to repay part of the 150,000 pounds owed by Tempest to CCI, the balance of 100,000 pounds was to be interest free and to be paid back on terms over the next two years; (c) the share capital to Tempest was to be transferred to A for 1 pound; (d) the Charterhouse Group would repay to Tempest the redundancy compensation which it would have to pay to its managing director, and (e) Tempest would enter into various restraint of trade covenants with the Charterhouse Group. The transaction for the acquisition of the share capital of Tempest by A was to be effected through another Charterhouse Group Company, Charterhouse Investments Trust (CIT) to which CCI would first transfer its Tempest shares.

Also, on the day of completion, it was further agreed that CCI would waive a debt of over 10,000 pounds which was owed to it by Tempest. Further, on the same day A reluctantly signed a letter agreeing (surrender agreement) that the adjusted tax losses for the years 1979 and 1980 would be surrendered to companies within the Charterhouse Group. A was able to restore Tempest to health and vigor within a short period. The letter (surrender agreement) became the cause of an action. CIT sued Tempest for the transfer of the company's tax losses for 1979 and 1980 which it was alleged was part of the original agreement for the transfer of control of Tempest to A. Tempest alleged that the surrender agreement was unenforceable because, *inter alia*, it involved the provision of financial assistance by Tempest for the purchase of its shares and was unlawful under s. 54 of the Companies Act 1948, the equivalent of our s. 67. In granting the order of specific performance the Court held that there was no technical definition of the phrase the "giving of financial assistance" within the meaning of s. 54 of the Companies Act 1948 and it therefore had to be interpreted in the light of the language of ordinary commerce. The commercial realities of each transaction would have to be examined to determine if it could be properly determine if it could be properly described as involving the giving of financial assistance. The fact that a company received a fair value in connection with a particular transaction in the sense that any cash paid out was replaced by an asset of equivalent value did not entail that the transaction could not constitute the giving of financial assistance, as if the dominant purpose was to put the other party in funds to purchase the company's shares then the section would be contravened. But where, as here, there was no question of cash being provided for the purchase of Tempest's shares, the only way in which Tempest could be said to have given financial assistance was if it made a net transfer of value which reduce the price A had to pay for the shares compared with what he would have had to pay for them if the whole transaction had not taken place. On the facts, Tempest had not discharged the burden of showing that the surrender of the tax losses by Tempest as part of the whole agreement involve a net transfer of value to the Charterhouse Group constituting the giving of financial assistance.

Further, Mr. Mahinder Singh Dulku said the basic intent of the parties was not to enable Kidurong to buy shares in Chen but to develop the land and transfer the houses. As we mentioned earlier the learned Judge was correct to refer to the sale and purchase agreement as really a joint venture agreement. The object of the agreement was declared in the agreement itself. The recital states clearly that "The vendors are desirous of selling and the purchaser is desirous of buying the whole 1,200 ordinary shares of RM1000 each in the said company ...". By Clause 1 it was agreed that "the vendors shall sell and the purchaser shall purchase the whole of the 1,200 ordinary shares ... .

Miss Appleby for the 3rd appellant pointed out that in *Carney's* case the share agreement did not stipulate for payment of the purchase price of the shares out of the moneys of Airfoil but by cash and cheque, whereas, here, the agreement specifies payment of the shares out of the asset of Chen, i.e., the land on which the houses will be built and it is not possible to separate the land from the houses. In *Charterhouse's* case while an asset was taken out of the company to fund the purchase it was immediately replaced by an asset of equivalent value. Here there was no such replacement.

Mr. Colin Lau for the 1st and 2nd appellants referred to *Mookapillai & Anor. v. Sri Saringgit Sdn. Bhd. & Ors.* [1981] 2 MLJ 114 where an order was made for the winding up of a company and liquidator appointed. The liquidator took steps to sell the rubber estate belonging to the company. The appellants applied for a stay of execution. An agreement was arrived at between the majority and the minority shareholders of the company, the effect of which was to provide that the company would purchase the shares of the minority

shareholders for RM1,260,910 and for a reduction of the paid-up capital of the company and the company would raise the stipulated sum be a mortgage of its assets. The learned Judge refused the application and directed the liquidator to proceed with the sale. The appellants appealed. The Federal Court held that s. 67 of the Companies Act 1965 clearly prohibits except as it otherwise expressly provided by the Act the purchase by a company of its own shares or any direct or indirect financial assistance by it for the purchase of its shares. In this case there was a prayer for an order for reduction of capital without going through the essential requirement laid down in s. 64 of the Act for a special resolution and the other requisite preliminaries. The provisions of ss. 64 and 67 therefore applied to prelude the order sought. As Abdoolcader J, as he then was, delivering the judgment of the Court observed at p. 115:

> ... The rule laid down by the House of Lords in *Trevor v. Whitworth* [1887] 12 App. Cas. 409 that a company has no power to purchase its own shares remains inviolate, and very recently in *Armour Hick Northern Ltd. & Ors. v. Whitehouse & Ors.* [1980] 3 All ER 833 it was held that on the true construction of the English counterpart of s. 67 of the Act the prohibition against the provision of financial assistance for the purchase of shares was not confined to assistance given to a purchaser but extended to assistance given to the vendor of the shares ...

That case explains clearly the applications of s. 67. Although the sale was a sale pursuant to a section in the statute there was a breach of s. 67. It was also submitted that Kidurong used all the money it obtained from Chen's charge of the land for the projects, i.e., to build the houses and that the payment of the shares was to be by the transfer of part of the project. It is true that the payment although expressed in cash was to be made in kind by the transfer of houses. However, it must be kept in mind that the provisions of s. 67 is very wide. The financial assistance can be direct or indirect. The funding of the consideration by Chen, i.e., the funding of the project which in effect is the funding of the houses to be transferred is any direct or indirect financial assistance and as such is a breach of s. 67. Section 67(3), however, makes it a criminal offence on the part of each officer of the company who is in default but does not say that the transaction is a total loss. A transaction whereby a company assisted in the purchase of its own shares, in breach of the section and to its prejudice, would be misfeasance on the part of the company's directors and in such a case the company would seem to have a remedy against the directors. Indeed, s. 67(6) provides for the recovery of any loan or financial assistance given in contravention of the section. The case of each appellant must be considered separately. Having heard the submissions of the parties we are of the view that the 3rd appellant succeeds on this ground.

Variations

On variations, in his judgment the learned Judge found at p. 7 (Part A Vol. I) as follows:

> It was not disputed by the parties that the following variations were made to the agreement:
>
> (a) Between July 1981 and August 1982 material variations were agreed to the specifications of the one detached house to be transferred to the plaintiff under the Fairway Project. Similar alterations were also made and agreed to in respect of detached house in Hilltop project by the plaintiff represented by Mr. Ong Chin Kow, plaintiff's husband and Mr. Ting Ing Chiew, the joint managing director of Kidurong.
>
> (b) Further on 28 February 1983 the plaintiff agreed to accept four units of flatted apartments instead of four (4) units of semi-detached houses, the plaintiff having the free choice to choose from any floor or any block of the flatted apartments.

(c) Then on 21 August 1982 Mr. Ong Chin Kow requested and it was agreed that arches in the car porch area be incorporated to the two detached houses to be transferred to the plaintiff after the building plans were approved by the relevant authorities on 27 July 1982 in respect of Fairway and Hilltop project.

In dealing with the two guarantees and the question whether Ling had been discharged from the two guarantees by reason of the material variation, the learned Judge thought the variation were minor compared to the size of the project. He stated at p. 23 (Part A Vol. I) as follows:

... I also find the contract of guarantee for Taman Hilltop and Taman Fairway are also valid. The contracts of guarantee were clearly for a specific purpose of ensuring the due performance of the two joint venture agreements. The defendants tried to make much of the fact that Mr. Ting (DW1) was running the project including authorising variations without express authority of the 2nd, 3rd and 4th defendants. I find that the 2nd, 3rd and 4th defendants by their conduct have given general authority to and entrusted DW1 to carry on the development project the best way he could as they were either abroad or busy with their own business. The variations authorised by DW1 were so minor compared to the size of the project. It so happened the project got into difficulty and the defendants are made to account. If the project had succeeded and made profits I have no doubt that the 2nd, 3rd and 4th defendants would have claimed credits.

We do not think that respondents can now say, in the light of the findings of the learned Judge, that there were no variations unless they cross appeal which they have not done. We are satisfied that there were variations to the Taman Fairway and Taman Hilltop agreements and that the variations were material. These were also the findings of the learned Judge.

Pursuant to the terms of the guarantee the consideration was the execution of the Taman Fairway agreement for the sale to Kidurong of 9.47 acres of land. The land was reduced as the recital in the Taman Fairway agreement clearly indicated as follows:

Where the developer shall be deemed to have knowledge of an area of approximately 1.552 acres out of the said land (being the 9.47 acres) being acquired by the Government for the road construction and for a way lease transmission line.

It is to be noted that whereas the guarantee was executed on 17 March 1980 the Taman Fairway agreement was later executed on 17 May 1980. The developer was Kidurong. Ling stated that he had no knowledge of this recital at the time he executed the guarantee and also that he did not become a director until 6 June 1980. His evidence was never challenged.

The variation to the two detached houses would incur extra construction cost of RM87,000 for each house totalling RM174,000. Ling said he neither knew nor consented to this variation. Again his evidence was not challenged. This is not a small amount. We do not think it is fair for the learned Judge to compare the size of the entire project to these variations which he said were minor. The guarantees merely cover part of the entire project in respect of the houses to be transferred to the respondents.

Further, the guarantee specifically guaranteed the due performance and transfer of the house referred to under Clause 6(a) of the Taman Fairway agreement. Variation was made by way of a supplementary agreement. Clause 6(a) was deleted and superseded by a new Clause 6(a) whereby certain semi-detached houses were changed to flats. Here again Ling stated he had no knowledge of the variation and did not consent. The supplementary agreement also gave Madam Lim the right to choose any floor of the flatted apartments. Different floors command different values depending on their location. Then there was also the express

condition that Kidurong had to buy back the 4 units of flats within one year after completion at RM250,000 per unit when each unit was expressly stated to be RM100,000. This would involve a difference of RM600,000. Ting stated clearly that there was no consultation with Ling with reference to the variation and execution of the supplementary agreement and no board meeting of Kidurong was called to approve the same. Ting's evidence was not challenged.

The Taman Hilltop agreement was also varied by a supplementary agreement dated 17 May 1980 although executed sometime afterwards whereby the shares in Chen were to be deposited with certain solicitors as stakeholder pending completion of the Taman Hilltop project on terms that if Kidurong did not fully comply with its obligation thereunder then the shares would be returned to the vendors at their request otherwise they would be transmitted to Kidurong. The agreement was signed by Ting and 4th appellant. The Taman Hilltop guarantees signed by Ling referred to the Taman Hilltop agreement and no reference was made to the supplementary agreement of the same date. Despite this the respondents contended that the variation was valid although the Taman Hilltop agreement was not performed as varied. Ling stated that he knew nothing about the variations and was not consulted. He said if he was consulted he would not have consented as such variations were prejudicial to him.

The learned Judge was satisfied on the evidence that material variations were made to the Taman Fairway and the Taman Hilltop agreements. (See Part A Vol. I, pp. 7 and 8). He pointed out that:

> Between July 1981 and August 1982 material variations were agreed to the specifications of the one detached house to be transferred to the plaintiff under the Fairway project. Similar alternations were also made and agreed to in respect of detached house in Hilltop project by the plaintiff represented by Mr. Ong Chin Kow, plaintiff's husband and Mr. Ting Ing Chiew, the joint managing director of Kidurong.

Section 86 of the Contracts Act 1950 provides that:

> Any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.

This section came up for construction in *Citibank N.A. v. Ooi Boon Leong* [1981] 1 MLJ 282 & 283 where Raja Azlan Shah, then, LP observed as follows:

> The section provides express provision for the respondents to consent to any variation. They are the sole judges whether or not they will consent to remain liable notwithstanding such variation, and that if they have not so consented they will be discharged. This provision is in accordance with what is stated to be the law by Cotton LJ in *Holme v. Brunskill* [1878] 3 QBD 498 which was followed in the Privy Council in *National Bank of Nigeria Limited v. Awolesi* [1964] 1 WLR 1311 at 1316:
>
> > The true rule in my opinion is, that if there is any agreement between the principles with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet that if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the Court, will not, in an action against the surety, go into an inquiry as to the effect of the alteration ... but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable notwithstanding the alteration, and that if he has not so consented he will be discharged.

The onus of proving that the surety consented to the alterations of the contract is upon the party seeking to enforce the guarantee. (See *Law on Guarantee* by McGuiness, p. 12; *Rowlatt on Principles of Surety*, p. 90; *O'Donovan Phillips on Modern Contracts on Guarantee*, pp. 269, 270; *The General Steam Navigation Co. v. Rolt.* [1858] 6 CB (NS) 550.

Mere knowledge of the variation is insufficient. There must be consent to the variation, although implicit consent may be inferred. However, the authorities establish that implied consent may be inferred only in particular circumstances, examples of which are where the guarantor himself arranges the variation (see *Wren v. Emmett Contractors Pty. Ltd.* [1969] 43 ALJR, 213 where he is involved with the preparation of documents necessary for its execution (see *Woodstock v. Oxford & Worcester Railway Company* [1953] 61 ER 551; where a guarantor is a director of the principal company and he negotiates with the creditor in that capacity, he will seldom if ever, be allowed to plead that he has not assented to the variation in his capacity as a guarantor but only in his capacity as a director of the principal debtor (see Mahon J in *Winstone v. Bourne*; [1978] 1 NZLR, 94, 96, see also generally *Coronation Electronics Ltd. v. Lalchand Mahtani* [1987] 1 MLJ 190.

Quite clearly there were material variations made to the Taman Fairway and the Taman Hilltop agreements. These variations are not insignificant. They are certainly not minor as indicated by the learned Judge who compared the variations to the size of the two projects. The respondents have not persuaded us that the variations have benefitted Ling who said that the variations in fact prejudiced him. Neither have the respondents discharged the onus of proving that Ling consented to the variations. The undisputed evidence shows that there was no knowledge of or consent to the variations by Ling.

While consent to variations may be inferred we do not think consent can be inferred because of the conduct of Ling when that conduct is merely "being abroad or busy with his own business." Kidurong is in law a separate entity to its directors. Ling was not the managing director. He played no part whatsoever in negotiating any of the variations. He had no knowledge at the time of the variations. He was not consulted by Ting on such variations. He gave no authority whatsoever, express or implied, to anyone to consent to any variation. Ting himself confirmed this when he stated (see Part B, p. 234):

> I agreed to the amendments. I did not consult anyone as the other parties were overseas and could not be easily reached. I was also the joint managing director of the 1st defendant.

As managing director Ting could bind Kidurong but he could not bind a co-director on personal guarantees given to Madam Lim and the shareholders of Chen. Ting would require authority to bind Ling on any variation prejudicial to Ling. But Ling had given no authority express or implied to Ting or anyone else. The fact that Ling was abroad or busy at that time of the variations cannot amount to implied consent to the variations.

In our judgment, if the learned Judge has not been led to compare the size of the whole project with the variations he would possibly have come to a different conclusion. The guarantors only guaranteed the due performance of a part of the whole project involving houses to be transferred to the respondents. We agree with the learned Judge that the variations were material but we differ with him on the consequence of the variations. We consider that the effect of the variations were such as to discharge the 3rd appellant Ling from his obligations in respect of the Taman Fairway and the Taman Hilltop guarantees. In our judgment the 3rd appellant succeeds on this ground also.

Accordingly, we allow the appeal of the 3rd appellant with costs to be taxed both here and the Court below. His deposits are to be refunded to him. As regards the 1st and 2nd appellants we dismiss their appeal with costs to be taxed both here and the Court below. Deposit to respondents to account of taxed costs.

Also found at [1990] 1 CLJ 687